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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 13 CR 51

ARCADIO REYES-ARIAS,

Defendant.

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New York, N.Y.
August 14, 2013
10:11 A.M.

Before:

HON. PAUL G. GARDEPHE,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
EDWARD DISKANT
Assistant United States Attorney

MARGARET SHALLEY
Attorney for Defendant

Spanish Language Interpreter: Paula Gold

(In open court; defendant present)

THE COURT: Please be seated.

THE DEPUTY CLERK: Call the case of United States v. Arcadio Reyes-Arias.

Is the government ready?

MR. DISKANT: Good morning, your Honor. Edward Diskant, for the government.

THE DEPUTY CLERK: For defendant?

MS. SHALLEY: Margaret Shalley for Arcadio Reyes-Arias.

THE COURT: We were last together July 31, 013, at which time I accepted the defendant's guilty plea to counts one, two and four of the superseding information.

I refused to accept defendant's plea as to count three to the charge of bank fraud, because of concerns that the defendant's allocution was insufficient under United States v. Nkansah, 699 F.3d 743 (2d.Cir.2012).

In Nkansah, the Second Circuit held that "convictions for bank fraud are limited to situations where the defendant (1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property; and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss." Nkansah 699 F.3d at 748, quoting United States v. Barrett, 178 F.3d 643, 647- 48 (2d Cir. 1999).

In Nkansah, the Court states in the context of a bank fraud charge, "the government has to prove beyond a reasonable doubt that appellant intended to expose the bank to the losses." Id.

In his allocution the defendant stated that he want to buy a house in which he used to live. The owner of the house was willing to sell the house to the defendant, but he did not have enough money to buy it.

The owner agreed to deposit 33,000 in the defendant's bank account. It could be used as a down payment on the home. The defendant agreed to give the $33,000 back to the owner after the sale of the house went through, citing plea transcript 28-31.

The defendant went to Wachovia for the purposes of obtaining a loan to purchase the property. He completed a loan application, but did not disclose that the $33,000 in his bank account had come from the seller, and was not his money, and had to be returned to the seller after the transaction went through, plea transcript 28-29.

After eliciting this information from the defendant, I asked him whether he intended to expose Wachovia to a risk of loss. The defendant stated that he had no such intent. Citing plea transcript 29.

I then asked the defendant whether he understood that the bank would not have given him the loan if it understood

that the $33,000 down payment had been provided by the seller, because it would have concluded that he couldn't afford to purchase the house. The defendant agreed. Transcript. Plea transcript 32.

I then asked whether the defendant understood that, given that he didn't have the down payment to purchase the house absent the seller's money, there was a chance that the bank would not get paid back. The defendant said that he did not believe at the time that there was any risk that the bank would not be paid back. Plea transcript 31-33.

I then stated that I would not accept the plea, because it appeared that the defendant was saying that he never had any intent to harm Wachovia, and never believed that he was exposing it to a risk of loss. I invited further briefing on the subject from counsel.

I received a letter from the government later that day. In that letter, Mr. Diskant said that despite the very broad language in Nkansah stating that the government must prove that a defendant intended to expose the bank to losses, such an intent maybe inferred, at least with respect to loans from banks where there is proof that the defendant submitted false information on a bank loan application.

In Nkansah, the appellant was part of a group that filed fraudulent tax returns based on stolen names, dates of birth and Social Security numbers. All of the tax returns

called for a tax refund.

The defendant deposited the tax refund checks into bank accounts and later withdrew the money. 699 F.3d at 746.

On appeal, Nkansah argued that the government was required to prove that he intended to victimize the banks, as opposed to the U.S. Treasury. It would seem that any time someone deposits a fraudulently-obtained check into a bank account, and obtains the proceeds, that the bank faces some risk of harm.

In reversing the defendant's bank fraud conviction, the Court suggested, however, that the bank might have been a holder in due course, and further pointed out that the government had offered no evidence that the bank actually had suffered a loss. Id. At 750-51.

The government points out here, correctly, that the Court in Nkansah also stated that "where the direct legal exposure to loss is sufficiently well-known, a jury may infer that the defendant intended to expose the bank to losses." Id at 750.

Moreover, the Court stated in a footnote that its decision "leaves untouched the [bank fraud] statute's protection of banks from fraudulent practices in the security of loans." Id at 749. Note 2.

I read this footnote as stating that Nkansah has no application in the context of a bank fraud case involving a

fraudulent bank loan application. That reading is confirmed by subsequent decisions in the bank fraud area.

For example, after Nkansah, the Second Circuit has stated that "evidence beyond a reasonable doubt that defendants fraudulently evaded a known down payment requirement is sufficient to support a bank fraud conviction." United States v. Norris, 513 Federal Appendix, 57, 2013 Westlaw 781038 at *1 (2d Cir.2013), quoting United States v. Brandon 17 F.3d 409 at 426 to 27 (1st Cir. 1994).

The Norris court stated that such evidence satisfies Nkansah's intent requirement because "failing to make a down payment necessarily exposes a bank to a greater risk of loss." Norris 2013 Westlaw 781038 at *2. See also Barrett vs. United States 663 F.3d 71 at 88 (2d Cir. 2011) ("where a borrower has knowingly misstated his ability to pay back a loan, a trial judge does not plainly err by omitting an intent to harm instruction from a bank fraud charge." Quoting United States v. Chandler 98 F.3d at 711, 716 (2d Cir. 1996).

Furthermore a "intent to expose a bank to actual or potential losses is not inconsistent with an honest belief that no harm would come to the bank. "United States 320 Federal Appendix 74, 76 (2d Cir. 2009).

Accordingly, even if a defendant "intended no harm to [a bank] because he was going to fully pay back the loans," it is a reasonable inference that the defendant "intended some

real and immediate harm or potential loss to the [the bank] in the short term, which is sufficient to sustain his conviction [for bank fraud]" United States v. Dupree 2012 Westlaw 5333946 at *25 (E.D.N.Y. Oct. 26, 2012).

In sum, I do not believe that in order to accept the defendant's guilty plea to bank fraud, it is necessary for him to allocute that he had an intent to cause harm to Wachovia.

In light of footnote two in Nkansah and subsequent decisions, I conclude that such an intent can be inferred where defendant has provided false information, including false information concerning a down payment in order to obtain a loan from a bank.

Accordingly, my intention is to re-allocute the defendant on count three, to confirm that there is an adequate factual basis for his guilty plea to count three. If his admissions are consistent with what he told me back on July 31, it is my intention to accept the plea.

Mr. Reyes, all of the information I provided to you on July 31, 2013 concerning your rights and the consequences of a guilty plea is still in effect.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Is it still your intention to plead guilty to count three, which charges you with bank fraud?

THE DEFENDANT: Yes, sir.

THE COURT: And then tell me, again, what makes you believe that you are guilty of the crime of bank fraud.

THE DEFENDANT: Because in 2006 I submitted a bank loan to the Wachovia Bank with false information. I told the bank that I had $33,000 in my bank account. And I actually knew that that money was not mine. I obtained the mortgage from the bank, and I knew that if I didn't pay the loan back, that the bank would suffer loss.

THE COURT: All right. Now, where was the Wachovia Bank that you were dealing with?

THE DEFENDANT: In Newark, New Jersey.

THE COURT: Now, what's the government's position on venue?

MR. DISKANT: There is a waiver of venue with respect to count three.

THE COURT: All right. And does the government represent that deposits at Wachovia was were insured by the Federal Deposit Insurance Corporation at the time of the defendant's false bank loan application?

MR. DISKANT: Yes, your Honor.

THE COURT: Mr. Diskant do you request me to ask any further questions of the defendant?

MR. DISKANT: No, your Honor, thank you.

THE COURT: All right, then.

Mr. Reyes, are you pleading guilty because you are

guilty, and are you pleading guilty voluntarily and of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I'll ask you now how you plead to count three; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right. Because you acknowledge that you're guilty as charged in count three, because I find that you know your rights and you have waived them knowingly and voluntarily, because I find your plea is entered knowingly and voluntarily and is supported by an independent basis in fact containing each of the essential elements of the offense, I accept your guilty plea to count three and adjudge you guilty of that offense.

All right. I have already set a date for sentencing.

Is there anything else we need to do today?

MR. DISKANT: No, your Honor. Thank you.

MS. SHALLEY: No, your Honor. Thank you.

THE COURT: Thank you.

(Adjourned)